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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DAVID WATKINS, Plaintiff and Respondent, v. CENTRAL FREIGHT LINES, INC., Defendant and Appellant.	A145579 (Alameda County Super. Ct. No. RG 11-573600)

After David Watkins prevailed on his claim for missed meal periods and obtained a judgment of $3,217.50, the trial court found Watkins was the prevailing party and awarded him costs pursuant to Code of Civil Procedure[1] section 1032. Central Freight Lines, Inc. (Central Freight) now appeals from that decision, arguing it was the prevailing party because it obtained dismissal of Watkins's other nine causes of action. Alternatively, Central Freight asserts the trial court should have denied Watkins costs pursuant to section 1033 because his recovery was below the jurisdictional minimum for an unlimited civil case. Central Freight also appeals from the trial court's order awarding Watkins costs of proof in connection with Central Freight's denial of a request for admission concerning the meal period claim. Central Freight contends the trial court erred because it had a good faith basis for denying the request for admission. We affirm the prevailing party determination and the award of costs under section 1032, but reverse the order awarding costs of proof.

[1] All statutory references are to the Code of Civil Procedure, unless otherwise indicated.

I. BACKGROUND

Watkins sued Central Freight in 2011. The complaint asserted 10 causes of action. Six of these claims were dismissed in one way or another and only four were submitted to the jury: racial discrimination, adverse employment actions and failure to rehire in violation of public policy, failure to prevent discriminatory practices, and failure to provide meal periods.

The jury returned a special verdict for Central Freight on the three discrimination claims. On the meal period claim, the jury found for Watkins. Specifically, the jury found Watkins worked through his meal breaks on 150 days, and on each of these days was not paid for one additional hour of work for the missed meal break. Watkins was awarded damages in the amount of $2,925, plus $292.50 in prejudgment interest.

Judgment was entered on the special verdict on November 13, 2012, awarding Watkins damages of $3,217.50 on the meal period claim and finding for Central Freight on the remaining claims. Both Watkins and Central Freight claimed they were the prevailing party and filed memoranda of costs. Each party responded to the other's memorandum by filing a motion to strike or, in the alternative, tax costs. While the motions to tax were pending, the trial court granted Watkins's motion for a new trial. In a prior appeal, we reversed the trial court's new trial order and affirmed the November 13, 2012 judgment. (*Watkins v. Central Freight Lines, Inc.* (Sept. 17, 2014, A138015) [nonpub. opn.].)

After remand, the parties renewed their motions to strike or, in the alternative, tax costs. Also, on February 26, 2015, Watkins filed a motion for costs of proof, including attorney fees, pursuant to section 2033.420. The trial court granted Watkins's motion to tax costs and denied Central Freight's. Citing *Michell v. Olick* (1996) 49 Cal.App.4th 1194 (*Michell*), the trial court found Watkins was the prevailing party because he obtained a net monetary recovery. Watkins was awarded costs in the amount of $41,300.28. The trial court also granted Watkins's motion for costs of proof, but found only 10 percent of Watkins's fees were recoverable. The court awarded Watkins an additional $31,596 for costs of proof.

II. DISCUSSION

A. *Prevailing Party Determination*

Central Freight argues the trial court erred in finding Watkins was the prevailing party and awarding him costs on that basis. Central Freight maintains it is the prevailing party because it achieved its litigation objectives and prevailed on nine of the 10 causes of action asserted by Watkins.[2] In the alternative, Central Freight argues that, to the extent Watkins was entitled to costs, those costs should have been reduced because they were unrelated to the one claim on which he prevailed. We find these arguments unavailing. Remarkably, Central Freight fails to address or even acknowledge this court's decision in *Michell*, *supra*, 49 Cal.App.4th 1194. The trial court relied on *Michell* in its written order, and the case is directly on point.

A prevailing party is entitled to recover costs as a matter of right in any action or proceeding. (§ 1032, subd. (b).) Section 1032 defines the prevailing party to "include" four categories: (1) "the party with a net monetary recovery," (2) "a defendant in whose favor a dismissal is entered," (3) "a defendant where neither plaintiff nor defendant obtains any relief," and (4) "a defendant as against those plaintiffs who do not recover any relief against that defendant." (§ 1032, subd. (a)(4).) The statute also sets forth an additional category for situations "[w]hen any party recovers other than monetary relief and in situations other than as specified." In that case, the prevailing party is determined by the trial court, and the award of costs is within the court's discretion. (*Ibid*.)

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[2] Even if Central Freight was the prevailing party, it could still be precluded from recovering its costs. Pursuant to the Supreme Court's recent decision in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, a prevailing defendant in a FEHA (California Fair Employment and Housing Act) action should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so. (*Williams*, at p. 115.) The rule is asymmetrical, and does not apply to prevailing plaintiffs. (*Ibid.*) As we affirm the trial court's order finding Watkins was the prevailing party in the action, we need not determine whether Watkins lacked an objective foundation to bring his FEHA claims.

In *Michell*, this court addressed the first category described in section 1032, "the party with a net monetary recovery." (*Michell*, *supra*, 49 Cal.App.4th at p. 1198.) Two attorneys, Michell and Olick, agreed to the split fees recovered in a lawsuit, after the former referred a client to the latter. (*Id.* at p. 1196.) Olick drafted a malpractice complaint on behalf of the client against Michell. (*Ibid.*) That lawsuit settled, and Michell filed a cross-complaint against Olick for breach of the agreement to split fees, bad faith denial of the contract, and legal malpractice. (*Ibid.*) When Olick filed his own cross-complaint, Michell filed a second cross-complaint for assault, battery, and negligence. (*Ibid.*) The jury awarded Michell $63,000 for her malpractice claim, but found against her on all of her other causes of action. (*Ibid.*) Olick had dismissed his cross-complaint before the first day of trial. (*Ibid.*) The trial court denied both parties' requests for costs, reasoning the parties spent most of their time on Michell's assault and battery causes of action, which the jury had rejected. (*Id.* at p. 1197.)

On appeal, we found the trial court erred in denying Michell's request for costs. We held: "It is clear from the statutory language that when there is a party with a 'net monetary recovery' (one of the four categories of prevailing party), that party is entitled to costs as a matter of right; the trial court has no discretion to order each party to bear his or her own costs." (*Michell*, *supra*, 49 Cal.App.4th at p. 1198.) We also construed the "party with a net monetary recovery" to include a plaintiff who obtained only a partial recovery, even where a defendant had not sought damages in a cross-complaint. (*Id.* at p. 1199.) We expressed concern Michell's cross-complaint was a "shotgun blast"—she sued on numerous unrelated causes of action and prevailed on only one—and she was allowed to recover costs related to unmeritorious causes of action upon which she did not prevail. (*Id.* at p. 1200.) But we were compelled to apply the statutory directive and left it to the Legislature to set limits on allowable costs. (*Id.* at pp. 1200–1201.) The Legislature evidently did not share our concerns, as section 1032 has not been amended in the 20 years since *Michell* was decided.

Michell is on all fours with the instant action. Central Freight appears to concede this point, as it does not distinguish or otherwise address *Michell* in its briefing,

notwithstanding the fact the case was relied upon by the trial court and discussed in Watkins's responding brief. As in *Michell*, Watkins asserted a number of claims against Central Freight, prevailed on only one of them, and Watkins was the only party who obtained any monetary relief. This case is also like *Michell* in that the claim on which Watkins prevailed was unrelated to his other unmeritorious claims. Because Watkins was the only party to recover any amount of damages, he was the party with the net monetary recovery. Accordingly, Watkins was entitled to recover the costs incurred in connection with all of his claims as a matter of right, notwithstanding his failure to prevail on most of those claims.

Central Freight asserts *Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136 (*Sears*) controls the outcome in this case.[3] In *Sears*, the plaintiff signed a personal guarantee for a lease on the defendant's property. (*Id.* at p. 1140.) After the tenant defaulted, the plaintiff paid the defendant $112,000 on the guarantee under protest. (*Ibid.*) The plaintiff later sued the defendant for breach of contract, among other things, on the theory the guarantee no longer existed. (*Ibid.*) The defendant counterclaimed for an additional $5,461. (*Ibid.*) The trial court found the guarantee was valid, but the plaintiff was entitled to recover only $67,829.46, plus interest. (*Id.* at p. 1141.) The defendant received nothing on its cross-complaint. (*Ibid.*) The trial court found the defendant was the prevailing party, and our colleagues in Division Two affirmed. (*Id.* at pp. 1139–1140.)

While *Sears* cites *Michell* with approval, it holds the trial court's prevailing party determination under section 1032 is always discretionary, even when only one party obtains a net monetary recovery. (*Sears, supra*, 60 Cal.App.4th at pp. 1155–1156.) The court's holding was based on the following statement in section 1032: "When any party

[3] Central Freight also relies on *de la Cuesta v. Benham* (2011) 193 Cal.App. 4th 1287. But that case concerns prevailing party determinations under Civil Code section 1717, not Code of Civil Procedure section 1032. (*De la Cuesta*, at p. 1290.) Civil Code section 1717 pertains to the award of attorney fees and, unlike Code of Civil Procedure section 1032, makes no mention of net monetary recovery.

recovers other than monetary relief and *in situations other than as specified*, the 'prevailing party' shall be determined by the court, and under those circumstances, the court, *in its discretion*, may allow costs or not . . . ." (§ 1032, subd. (a)(4), italics added.) The court reasoned: "Since the preceding portion of section 1032 refers only to monetary recovery, and to terminations without recovery, it would be unnecessary to refer to 'other situations' if money were to be the only measure of success." (*Sears*, at p. 1155.) The court also stated that focusing solely on net monetary recovery would ignore problems presented by "net recoveries which were actually Pyrrhic victories." (*Ibid.*) Based on this reading of the statute, the court concluded: "While the trial court cannot arbitrarily deny fees to a less than sympathetic party, it remains free to consider all factors which may reasonably be considered to indicate success in the litigation." (*Ibid.*)

At least one court has rejected *Sears*'s conclusion that a trial court's prevailing party determination under section 1032 is always discretionary. (See *David S. Karton, A Law Corporation v. Dougherty* (2014) 231 Cal.App.4th 600, 613 [holding *Sears*'s interpretation of § 1032 conflicts with our Supreme Court's decision in *Goodman v. Lozano* (2010) 47 Cal.4th 1327 and other appellate case law, including *Michell*].)[4] But even if *Sears*'s discussion of section 1032 is good law, it does not require reversal of the trial court's cost order in the instant action. As an initial matter, *Sears* acknowledges that "failure to succeed on all but one of several 'shotgun' causes of action has been held insufficient to deny a party fees and costs." (*Sears*, *supra*, 60 Cal.App.4th at pp. 1155–1156.) Moreover, under *Sears*, we may only reverse a trial court's prevailing party determination if it constitutes an abuse of discretion.[5] In light of Watkins's success on his meal period claim, we cannot conclude the trial court abused its discretion here.

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[4] On the other hand, the Fourth Appellate District cited *Sears* with approval and adopted its interpretation of section 1032 in *Roden v. AmerisourceBergen Corp.* (2007) 155 Cal.App.4th 1548, 1580.

[5] While Central Freight relies on *Sears*, which holds a prevailing party determination is discretionary, it insists we review the trial court's order de novo. Central Freight cannot have it both ways.

In a related argument, Central Freight contends we should reverse because this is one of those "situations other than as specified" in section 1032.[6] According to Central Freight, "[c]omplex and infinite case scenarios make any mechanical or rote application of the prevailing party provision untenable." But the situation presented here is specifically contemplated by section 1032, as it is a case where one party obtains a "net monetary recovery." (See *Michell, supra*, 49 Cal.App.4th at p. 1198 ["It is clear from the statutory language that when there is a party with a 'net monetary recovery' . . . that party is entitled to costs as a matter of right . . . ."].) Even if Central Freight is correct and this is a situation "other than as specified," that means "the 'prevailing party' shall be as determined by the [trial] court, and under those circumstances, the court, *in its discretion*, may allow costs or not . . . ." (§ 1032, subd. (a)(4), italics added.) As discussed above, we cannot conclude the trial court abused its discretion in awarding costs to the only party who recovered damages in the action.

Central Freight argues it is the prevailing party because section 1032 also defines that term to include "a defendant in whose favor a dismissal is entered." Central Freight points out dismissal was entered in its favor on nine of the 10 causes of action asserted by Watkins. Central Freight's interpretation of the statute is directly at odds with our holding in *Michell*. Moreover, Central Freight does not cite any case holding a defendant who obtains dismissal of some but not all causes of action asserted against it is entitled to recover costs as the prevailing party. And some courts have suggested the provision of section 1032 dealing with dismissal applies only where a defendant obtains dismissal of an entire action. (See *Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733,

[6] Section 1032 prefaces its definition of various terms, including "prevailing party," with the following statement: "As used in this section, unless the context clearly requires otherwise." (§ 1032, subd. (a).) In its reply brief, Central Freight argues this statement is an explicit qualifier to the entire statute, which can "only reasonably be meant to qualify" the statute's definition of "prevailing party." We need not address the argument because it was raised for the first time on reply. In any event, the contention is unavailing. We cannot conclude the situation presented here "clearly requires" a prevailing party determination that departs from the statutory definition.

738 ["upon dismissal of an action in a defendant's favor, that party is entitled to an award of costs"].)[7]

For these reasons, we conclude Watkins was entitled to costs as a matter of right because he obtained a net monetary recovery. To the extent the trial court had the discretion to consider other factors in making its prevailing party determination, we cannot conclude the trial court abused that discretion here.

B. *Section 1033*

Central Freight contends the trial court erred by refusing to deny Watkins costs pursuant to section 1033. Under that statute, "if a plaintiff brings an unlimited civil action and recovers a judgment within the $25,000 jurisdictional limit for a limited civil action, the trial court has the discretion to deny costs to the plaintiff." (*Carter v. Cohen* (2010) 188 Cal.App.4th 1038, 1052.) Central Freight argues the trial court should have exercised its discretion to deny Watkins costs because he recovered only $3,217.50 in damages. The contention is meritless.

As an initial matter, Central Freight waived the issue by failing to raise it below. While Central Freight asserts it did present the issue to the trial court during oral argument, it can only point to counsel's assertion that Watkins recovered only "$3,200" and "[t]hat's an amount of money that they could have gotten in small claims court without any attorneys. It doesn't even meet the jurisdictional minimum of this court." At no point did Central Freight cite the relevant statutory provision or otherwise argue the trial court had discretion to deny costs because plaintiff's recovery fell below the jurisdictional minimum. Central Freight also contends that, even if the issue was not raised below, a new theory pertaining to questions of law may be asserted on appeal. But the application of section 1033 is inherently discretionary, and thus does not raise a

[7] Central Freight further argues "[i]t is obvious that if all Central [Freight] had to do to obtain a dismissal of this entire case was agree to pay Watkins for the deprivation of meal breaks, Central [Freight] would have done so immediately." But Central Freight did not settle this claim. Instead, it forced Watkins to litigate through trial. Central Freight cannot avoid Watkins's costs merely because it would have acted differently had it known it would lose.

question of law. We cannot possibly find the trial court abused its discretion under section 1033 when Central Freight failed to ask the court to exercise that discretion.

Even if the issue was not waived—it was—section 1033 merely grants the trial court the discretion to deny costs. It does not require the court do so. Central Freight does not explain why the trial court's failure to exercise its discretion in this particular instance constitutes reversible error.

C. *Costs of Proof*

Next, Central Freight challenges the trial court's order awarding Watkins $31,596 in costs of proof sanctions. We agree the trial court's ruling was an abuse of discretion. (See *Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1275–1276 (*Laabs*) [applying abuse of discretion standard].)

The costs of proof sanctions were issued pursuant to section 2033.420. The statute provides that if a party fails to admit the truth of any matter stated in a request for admission (RFA) and if the party requesting that admission thereafter proves the truth of that matter, the party requesting the admission may move the trial court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. (§ 2044.420, subd. (a).)

The trial court must make such an order unless it finds (1) an objection to the request was sustained or a response to it was waived under section 2033.290, (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable grounds to believe that party would prevail on the matter, or (4) there was other good reason for the failure to admit. (§ 2033.420, subd. (b).) A party who denies a request for admission has the burden of demonstrating that the denial was justified under one of the four exceptions listed in section 2033.420. (See *Garcia v. Hyster Co.* (1994) 28 Cal.App.4th 724, 735–736.) In determining whether a denial was justified, a superior court may consider whether " 'at the time the denial was made the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial.' " (*Laabs*, *supra*, 163 Cal.App.4th at p. 1276.) "[I]t is

[not] enough for the party making the denial to 'hotly contest' the issue. . . . [T]here must be some reasonable basis for contesting the issue in question before sanctions can be avoided." (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 511.)

In this case, Central Freight denied Watkins's RFA asking it to admit Watkins "would frequently have to cut his break early in order to make a scheduled delivery or would be otherwise ordered to go back to work by [Samuel] Ballance [(a Central Freight dispatcher)] before he completed his 30-minute break . . . ." Watkins filed a motion for costs of proof in connection with this RFA on February 26, 2015.[8] In response to the motion, Central Freight filed a declaration from Kris H. Ikejiri, the company's vice-president of administration, who verified Central Freight's responses to Watkins's RFA's. Ikejiri stated Central Freight denied the RFA at issue because Ballance told Central Freight he never ordered Watkins to go back to work before he completed his 30-minute meal break.

The trial court granted the motion for costs of proof, finding Central Freight did not have good reason to deny the RFA. The court explained: "[Central Freight]'s basis for its outright denial of RFA No. 12 is merely that Balance [*sic*] never admitted any wrongdoing. Such evidence is insufficient, as rarely do persons accused of wrongdoing admit to it. [Central Freight] can point to no objective evidence to show that [Watkins] was provided his full lunch breaks. In opposition to this motion, [Central Freight] submits no declaration from Mr. Ballance himself or explain why [*sic*] it is unable to do so. In these circumstances, the court finds the denial was unreasonable."

The trial court's ruling was an abuse of discretion. Central Freight conducted an adequate inquiry prior to responding to the RFA, as it asked Ballance about Watkins's allegations. Contrary to the trial court's holding, it was reasonable for Central Freight to rely on Ballance's response to this inquiry, especially since there was also evidence

[8] Central Freight argues Watkins's motion for costs of proof should have been denied as untimely, pursuant to California Rules of Court, rule 3.1702. Even if Watkins's motion was untimely, the trial court had the discretion to consider late papers (Cal. Rules of Court, rule 3.1300(d)), and it expressly exercised that discretion.

Watkins never complained to anyone at Central Freight that he was deprived of the opportunity to take his meal breaks. Even if the jury did not believe Ballance, it was not unreasonable for Central Freight to find his statements credible. We also disagree with the trial court's conclusion Central Freight could not prove it had a good faith basis for denying the RFA because it did not submit a declaration from Ballance. Such evidence was unnecessary in light of Ikejiri's declaration. That declaration indicates Ballance told Central Freight he never ordered Watkins to return to work before completing his meal break. It is unclear what a declaration from Ballance would have added, especially since Ikejiri's statement appears to be undisputed. In his appellate briefing, Watkins concedes Central Freight talked to Ballance before answering the RFA.

Watkins contends there was evidence Central Freight utilized a GPS system which "showed when Watkins had entered a stop and when he departed from them [*sic*]." Watkins asserts Central Freight should have analyzed this data before responding to the RFA, and it failed to perform any such analysis. But at most, the GPS data would have shown Watkins worked through his meal breaks. The data would not show whether Watkins was pressured to do so or whether he voluntarily chose to work through his meal break. The distinction is important. Our Supreme Court recently held that, while an employer must relieve the employee of all duty for a designated meal period, it "need not ensure that the employee does no work." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1034.) The court explained: "The difficulty with the view that an employer must ensure no work is done—i.e., prohibit work—is that it lacks any textual basis in the wage order or statute. While at one time the [Industrial Welfare Commission's] wage orders contained language clearly imposing on employers a duty to prevent their employees from working during meal periods, we have found no order in the last half-century continuing that obligation." (*Id.* at p. 1038, fn. omitted.)

Cicairos v. Summit Logistics, Inc. (2005) 133 Cal.App.4th 949, does not demand a different result. In that case, the court reversed an order granting an employer's motion for summary judgment on its truck driver employees' meal break claims. The employer maintained a computerized system on each truck that allowed it to keep track of various

aspects of the drivers' activities. (*Id.* at p. 962.) Drivers had to manually input certain factors into the system. (*Ibid.*) "By requiring its drivers to keep track of these factors, the [employer] was . . . regulating the drivers' activity to a certain extent." (*Ibid.*) The court found that although the defendant regulated its drivers' activities in various areas, "it did not schedule meal periods, include an activity code for them, or monitor compliance. As a result, 'most drivers ate their meals while driving or else skipped a meal nearly every working day.' " (*Ibid*.) Further, the employer pressured drivers to make more than one daily trip, making drivers feel that they should not stop for lunch. (*Ibid.*) As *Cicairos* did not involve a motion for costs of proof, its application here is questionable. Moreover, unlike in *Cicairos*, there is no indication Central Freight regulated its drivers' activities using its GPS tracking system, but failed to schedule meal periods.[9]

III. DISPOSITION

The trial court's prevailing party determination and award of costs pursuant to section 1032 is affirmed. We reverse the trial court's order granting Watkins's motion for costs of proof. The parties shall bear their own costs on appeal.

[9] Because we find the trial court erred in granting the motion for costs of proof, we need not and do not address Central Freight's contention the costs sought by Watkins were unreasonable.

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Margulies, J.

We concur:

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Humes, P.J.

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Banke, J.

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